

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Patricia Anderson,

Complainant,

vs.

Rebecca Otto, and

Rebecca Otto for Auditor,

Respondents.

NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION

AND

NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING

TO: Patricia Anderson, Rebecca Otto and Rebecca Otto for Auditor

On September 23, 2010, Patricia Anderson filed a Complaint with the Office of Administrative Hearings alleging that Rebecca Otto and Rebecca Otto for Auditor violated Minn. Stat. § 211B.06. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a prima facie violation of Minn. Stat. § 211B.06.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **1:30 p.m. on September 30, 2010**. The hearing will be held by call-in telephone conference. You must call: **1-888-742-5095** at that time. Follow the directions and enter the numeric pass code “**2494407275**” when asked for the meeting number.¹ The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be faxed to Judge Beverly Jones Heydinger at 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based upon a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in

¹ In the event that you have trouble connecting to the call, please contact Nancy Hansen at 651-361-7874 or Denise Collins at 651-361-7875.

the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minn. Stat. § 211B.35. If the presiding Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minn. Stat. § 211B.34, subd. 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, Saint Paul, MN, 55101, or call 651-361-7900 (voice) or 651- 361-7878 (TTY).

Dated: September 27, 2010

s/Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

Complainant Patricia Anderson, a former state auditor, is a candidate for state auditor in the general election in November 2010. Respondent Rebecca Otto is the current state auditor who seeks reelection. Anderson alleges that Otto and her campaign committee, Otto for Auditor, made false statements regarding Anderson's tenure as auditor. Anderson alleges that Otto stated that Anderson "only performed 10 investigations/letters of review" during her tenure as state auditor and that Otto has performed three times more investigations/letters of review than Anderson. Anderson alleges that Otto has made these statements on her website and in her campaign literature. Anderson also alleges that Otto made these statements in news articles and at the Greater Minnesota Cities Forum and then copied the articles and a video clip of the forum on her website. Anderson alleges that because the news articles and video were posted to Otto's website, they constitute "campaign material." Anderson alleges that Otto made these statements knowing they were false, or in reckless disregard as to whether they were false, in violation of Minn. Stat. § 211B.06.

Anderson included several attachments to her complaint, including newspaper articles purportedly documenting the 29 investigations/letters of review she conducted while she was state auditor (Attachment A); 8 pieces of "campaign material" in which Otto has made these false statements (Attachment B, including video clip);

documentation of three instances in which Anderson and others questioned Otto regarding the truth of these statements (Attachment C); and documentation that Otto removed the press releases that were issued by Anderson during her tenure as auditor from the State Auditor website (Attachment D).

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material with respect to the personal or political character or acts of a candidate. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false. Campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”²

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.³ It does not prohibit inferences or implications, even if misleading. However, the statement that must be proved false is not necessarily the literal phrase published but rather what a reasonable reader would have understood the author to have said.⁴

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.⁵ For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.⁶ A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.⁷

The Administrative Law Judge finds that the Complainant has alleged sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.06. According to Anderson, Otto has stated that Anderson completed only ten investigations while she was state auditor, and that Otto has completed three times that number of investigations. Anderson alleges that these statements have been incorporated into Respondents’ campaign material and are capable of being proven true or false. They

² Minn. Stat. § 211B.01, subd. 2.

³ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

⁴ *Jadwin v. Minneapolis Star and Tribune*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).

⁵ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

⁶ *Id.*

⁷ *Id.*

also refer to the character or acts of a candidate for election to office, and as such, come within the purview of Minn. Stat. § 211B.06. The Administrative Law Judge finds that the Complainant has alleged sufficient facts to support finding a prima facie violation of Minn. Stat. § 211B.06. The allegation will proceed to a probable cause hearing as ordered.

B. J. H.